CADDNAR

EXHIBIT A

***Skilbred, et al. v. Spaw, et al.*, 13 CADDNAR 99 (2013)**

[VOLUME 13, PAGE 113]

ORDER ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT ENTERED ON MARCH 13, 2013

Summary Judgment is granted in favor of the Applicant Respondents and the Department on all matters at issue except the issue of "the management of watercraft operations under IC. 14-15" and "the interests of a landowner having property rights abutting the public freshwater lake or rights to access the public freshwater lake" as specified at Indiana Code § 14-26-2-23(4 & 5).

HISTORICAL BACKGROUND

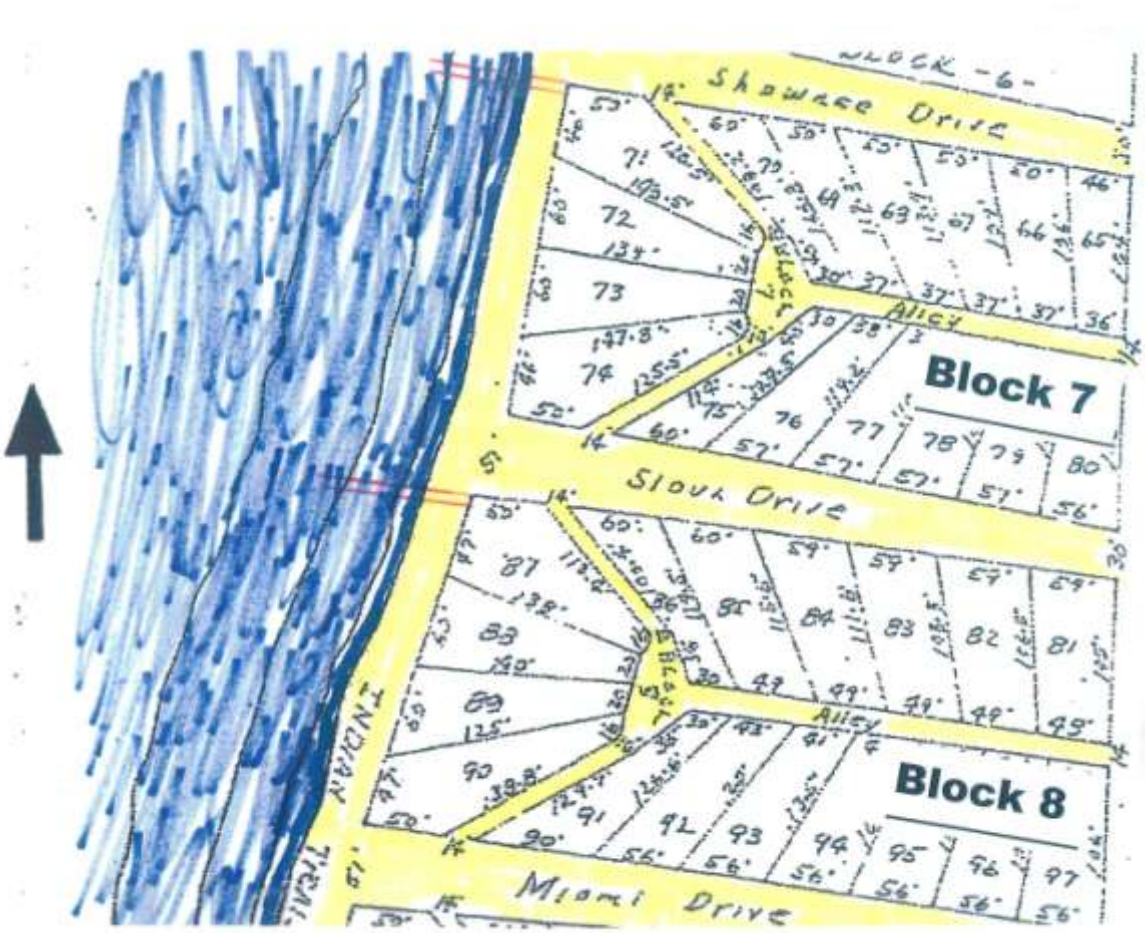
1. Many, if not all, of the parties to the instant proceeding have previously been involved in multiple adjudicatory proceedings the decisions in which have a direct bearing upon this proceeding. It is believed that a brief summary of two of those proceedings will provide a degree of perspective useful to understanding the discussion that follows.

2. The first such proceeding was decided by the Commission on July 28, 2010. *Spaw v. Ashley*, 12 CADDNAR 233, (2010). The second was decided by the LaGrange County Circuit Court on May 6, 2011. *Altevogt, et al. v. Brand, et al.*, Cause No. 44C01-0811-MI-066. Petitioners' Motion for Summary Judgment, Exhibits 12 & 14.

3. The Commission's final order in *Spaw* was affirmed on Judicial Review by the Allen County Circuit Court in an order entered on July 8, 2011, *Ashley, et al. v. Spaw, et al.*, Cause No. 02C01-1008-MI-1178. Applicants' Motion for Summary Judgment, Exhibit A(D).

4. Appeals to both the Commission's order in *Spaw* following judicial review and the LaGrange County Court's order in *Altevogt* are pending before the Indiana Court of Appeals, although no order has been entered staying effectiveness of the decisions.

5. Both the *Spaw* decision and the *Altevogt* decisions discuss certain grants and restrictions associated with the plat of Long Lake Park, one of which is a provision in the plat "that all drives, alleys, and walks are for the use of the owners of lots and their guests…" *Spaw* at 239. In *Spaw* it was determined that the "drives, alleys and walks", with respect to Block 7 and Block 8 of Long Lake Park, including Shawnee Drive, Sioux Drive, Miami Drive, a three-pronged alley existing within both Block 7 and Block 8, as well as Indian Trail, were available for use by any Lot owner within Long Lake Park. The drives, alleys and walks were generally depicted in yellow on the following diagram.



Spaw at 245.

6. In *Altevogt*, the Plaintiffs, some of whom are Petitioners here, requested the LaGrange County Circuit Court to determine that by dedication, adverse possession or otherwise that as relevant here the owners of Lots 71 through 74 in Block 7 and of Lots 87 through 90 in Block 8, which Lots abut Indian Trail, actually own the portions of the Indian Trail immediately adjacent to their Lots.

7. In denying the Plaintiffs' Petition, the *Altevogt* Court stated that the facts "establish that Plaintiffs cannot prove any of the elements of CONTROL, INTENT, or NOTICE by clear and convincing evidence, even though to prevail Plaintiffs must prove not one, but all of these elements." *At* pg. 17.

8. In *Altevogt*, the LaGrange County Circuit Court concluded. "It was the intent of the Developer, Lee J. Hartzell, as expressed in the plat and restrictions, that all lot owners in the Plat of Long Lake Park to be co-tenants as to all drives, alleys and walkways, **including the Indian Trail**. *At* pg. 20 *(emphasis added).*

9. The issues pertaining to the Long Lake Park Lot owners' riparian rights were determined to fall squarely within the sole jurisdiction of the Commission, *Altevogt* at pg. 18, and these issues are fully developed and decided in *Spaw*.

10. The riparian rights of the Lot owners within Long Lake Park are established by a separate and distinct grant contained within the plat which reads, "'Each lot owner shall be entitled to an easement on the Lake Shore six feet in width for a boat landing which easement shall be in front of the block in which the lot is located and the easement shall bear the same number as the lot it is for and the easements shall be numbered consecutively from North to South.' Plat Book 1, page 118, attached as Exhibit 'A' to Affidavit of Sharon Shiltz, LaGrange County Recorder (September 23, 2009) and included with 'Claimants' Motion for Summary Judgment' (Filed September 25, 2009)." *Spaw* at 238.

[VOLUME 13, PAGE 114]

11. The Commission determined as follows:

> 66. Each lot owner was entitled to an easement. No distinction was made in the easement among lot owners contingent upon their proximity to Big Long Lake.
> 67. Property decisions based upon this conveyance must properly treat all lot owners in an equivalent manner, but each lot owner was entitled to a geographically unique easement.
> 68. The easements traversed Indian Trail and extended to the lakeshore of Big Long Lake.
> 69. Through the easement described in Finding 41, Hartzell conveyed riparian rights to the lot owners as the dominant tenants.
> 70. The easement for each lot owner was six feet wide. The entitlement was on a lot specific basis. If a person owned more than one lot, the person received more than one easement. A person who owned 1½ lot was effectively entitled to an easement nine feet wide, if the lot and the one-half-lot were contiguous. A person who owned two contiguous lots was effectively entitled to an easement twelve feet wide. A person who owned three lots was entitled to an easement 18 feet wide and so on.
> 71. The purpose of the easement was for a "boat landing".
> …
> 81. The "boat landing" referenced by the easement described in Finding 41 was an unimproved or improved place from which boats may be used to deliver passengers or goods. Specifically prohibited was the placement of a boathouse. Examples of improvements that could be made by a lot owner included the placement of a pier or wharf.

Spaw at 241 & 243.

12. The "boat landings" (herein referred to as "riparian easements") are located within the Block in which the Lot is located numbered consecutively, by Lot number, from the northern most point of the Block, which for Block 7 is essentially the south boundary of Shawnee Drive and for Block 8 is the southern boundary of Sioux Drive. *Spaw* at 245.

13. The final order of the Commission stated:

> Each Lot owner in Block 6, Block 7, and Block 8 has a geographically unique easement on the shoreline or water line of Big Long Lake that is six feet wide. Subject to the regulatory authority of the Department of Natural Resources under IC 14-26-2 and 312 IAC 11-1 through 312 IAC 11-5, the easement may be used for a boat landing, including the placement of a temporary pier. The easement is in front of the Block in which the Lot is located. Each individual easement shall bear the same number as the Lot it is for and shall be numbered consecutively from north to south.

Spaw at 233.

PROCEDURAL BACKGROUND AND JURISDICTIONAL DETERMINATION

14. At issue in the instant proceeding are three permits identified as PL-21697, PL-21717, and PL-21704 (referred to collectively as "the Permits") issued to Lot owners within Long Lake Park each for the construction of a pier extending into Big Long Lake from riparian zones resulting from the Lot owners' combining of their individual six foot riparian easements as determined in *Spaw*.

15. Permit PL-21697 authorizes the construction of a pier under specified conditions "in front of four adjoining lot owners' deeded easements for Lots 92 through 97 owned by Jeffrey and Holly Spaw, Dave and Mary Remenschneider, Roger and Melissa Selking, and the Secretary of Housing and Urban Development (managed by Ofori & Associates) that combine for a total of 36' of shoreline." Permit PL-21697 is the subject of Administrative Cause Number 11-160W involving Respondents, Jeffrey A. and Holly Spaw, David A. and Mary J. Remenschneider, Roger W. and Melissa F. Selking, Secretary of Housing and Urban Development by and through its agent Ofori 7 Associates and the Department of Natural Resource ("Department"). Applicants' Motion for Summary Judgment, Exhibit B.

16. Permit PL-21704 authorizes the construction of a pier under specified conditions "in front of four adjoining lot owners' deeded easements for Lots 81 through 86 owned by Steven Ybarra, David Jennings, Gregory King and Alan Macklin that combine for a total of 36' of shoreline." Permit PL-21704 is the subject of Administrative Cause Number 11-162W involving Respondents, Steven G. and Karen Ybarra, David W. and Diana L. Jennings, Gregory O. King, Alan Macklin and the Department. Applicants' Motion for Summary Judgment, Exhibit C.

17. Permit PL-21717 authorizes the construction of a pier under specified conditions "in front of two adjoining lot owners' deeded easements for Lots 65 – 69 owned by Mark and Patricia Lorntz, Al Ensley, Scott Ensley and Greg Ensley that combine for a total of 30' of shoreline." Permit PL-21717 is the subject of Administrative Cause Number 11-161W involving Respondents, Mark A. and Patricia Lorntz, Al Ensley, Scott Ensley, Greg Ensley and the Department. Applicants' Motion for Summary Judgment, Exhibit D.

18. The Respondents to this proceeding who are the holders of PL-21717, PL-21704 and PL-21697 will be referred to collectively as "Applicant Respondents".

19. On September 6, 2011, the Petitioners, Lawrence J. Skilbred, Patricia L. Skilbred, James A. Williams, Patricia A. Williams, John D. Gross, Lynn E. Fisher and Betty J. Fisher as Trustees of the Revocable Living Trust of Lynn E. Fisher & Betty J. Fisher dated July 2, 2008, Michael M. Ashley, Lana S. Ashley, Lloyd A. Bickel, Karen A. Bickel, Carl Ray Mosser, Margaret M. Mosser, Phillip E. Lake, Karen M. Lake, Debra Ann Cozmas Parkinson, Page D. Liggett as Trustee of The Page and Carole Liggett 2005 Trust dated November 1, 2005, Roger N, Meyer, Beverly A. Meyer, Long View Financial, LLC, Thomas A. Hare, III, Regina K. Hare, James R. Morris and Mary Jane Johnson, (referred to collectively as "the Petitioners"), by counsel Barrett & McNagny LLP, filed the above captioned proceedings for the administrative review of the Department's approval of the Permits .

20. Because the Petitioners' arguments in opposition to the Permits are factually and legally similar it was agreed that for purposes of judicial efficiency the three administrative proceedings would be conjoined with respect to all motions, orders, pleadings and actions of any sort despite the retention of three separate and distinct administrative cause numbers. See Report of Prehearing Conference, dated October 31, 2011

21. Big Long Lake is a public freshwater lake. Indiana Code § 14-26-2-3, *Spaw v. Ashley*, 12 CADDNAR 233 (2010).

22. The Department is the administrative agency responsible for the administration of Indiana Code § 14-26-2, commonly referred to as the Lake Preservation Act, and 312 IAC 11-1 through 312 IAC 11-5 adopted for the purpose of implementation of the Lake Preservation Act under which the Permits purport to be issued.

23. Procedurally, Indiana Code §§ 4-21.5-3, commonly referred to as the Administrative Orders and Procedures Act, or AOPA, and 312 IAC 3 adopted for purpose of implementing AOPA will govern this proceeding.

[VOLUME 13, PAGE 115]

24. The Commission is the ultimate authority for proceedings involving the Lake Preservation Act. Indiana Code § 14-10-2-3 and 312 IAC 3-1-2.

25. Prehearing conferences were conducted on October 21, 2011 with notice of the same being served upon each of the Respondents. The Petitioners and Respondent, Department, appeared by counsel. Applicant Respondents to Administrative Cause Number 11-160W, Jeffrey A and Holly Spaw and David A. and Mary J. Remenschneider, Applicant Respondents to Administrative Cause Number 11-161W, Mark A. and Patricia Lorntz and Applicant Respondents to Administrative Cause Number 11-162W, David W. and Diana L. Jennings and Steven G. and Karen Ybarra, appeared by counsel, while Applicant Respondents to Administrative Cause Number 11-161W, Scott Ensley and Alan Macklin

appeared *pro se*. The remaining Applicant Respondents did not appear for the prehearing conference and have not, to date, participated in the proceedings in any way.

26. The Commission is possessed of jurisdiction over the subject matter and the persons of the parties involved in the instant proceedings.

SUMMARY JUDGMENT STANDARD

27. Under AOPA, summary judgment motions shall be considered in the same manner as a court that is considering a motion filed under Trial Rule 56 of the Indiana Rules of Trial Procedure. Indiana Code § 4-21.5-3-23

28. "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment may be rendered upon less than all the issues or claims, including without limitation the issue of liability or damages alone although there is a genuine issue as to damages or liability as the case may be." Indiana Rules of Trial Procedure, Trial Rule 56(C).

29. "'A fact is 'material' for summary judgment purposes if it helps to prove or disprove an essential element of the plaintiff's cause of action. A factual issue is 'genuine' for purposes of summary judgment if the trier of fact is required to resolve an opposing party's different versions of the underlying facts." *Rosheck v. Mader Dental*, 12 CADDNAR 251 (2010), internal citations omitted.

30. "The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which may be determined as a matter of law." *Wells v. Hickman*, 657 N.E.2d 172, 175, (Ind. App. 1995).

31. "A party or parties moving for summary judgment have the burden of proof with respect to summary judgment, regardless of whether it or they would have the burden in an evidentiary hearing." *Save Our Rivers, et al. v. Guenther, Ford & DNR*, 10 CADDNAR 213 (2006) citing *Regina Bieda v. B & R Development and DNR*, 9 CADDNAR 1 (2001).

32. If a judgment is not rendered upon the entirety of the case, the administrative law judge shall "make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." Trial Rule 56(D).

AGGREGATING RIPARIAN EASEMENTS

33. While the pier structures authorized by each of the individual permits are different as to design and configuration, the Permits and authorized pier structures share commonality with respect to the fact that each of the Permits issued by the Department authorizes the

Applicant Respondents to combine their individual riparian easements for the purpose of constructing the authorized pier structures to extend from the shoreline of Block 7 and Block 8 within Long Lake Park into Big Long Lake. Applicants' Motion for Summary Judgment, Exhibits B, C & D.

34. The six foot riparian easements owned by each individual Lot owner are "appurtenant easements" distinct from the common easement granted to all Lot owners with respect to Indian Trail. *Spaw* at 246, LaGrange Circuit Court, Cause No. 44C01-0811-MI-066.

35. The Petitioners maintain that each Lot owner's individual appurtenant riparian easement "can be utilized only for the benefit of the specific lot to which it is appurtenant, and for the benefit of no other lot." On this premise, the Petitioners conclude that the Department's issuance of the Permits, which authorize the aggregation of certain Applicant Respondents' riparian easements, is contrary to law. See Petition To Intervene, For Stay of Effectiveness and for Administrative Review, filed on September 6, 2011 in each of the above captioned proceedings.

36. The Petitioners hinge their challenge to the Permits and the combining of the Applicant Respondents' riparian easements upon common law relating to appurtenant easements. The Petitioners fail to consider the ramifications of the Indiana General Assembly's enactment of the Lake Preservation Act upon the application of common law relating to appurtenant easements that convey riparian rights.

The AOPA Committee's Striking of Language from the *Spaw* Nonfinal Order:

37. The Petitioners initially find support for their position in the fact that the Commission's AOPA Committee, in considering objections to the administrative law judge's nonfinal order in *Spaw*, struck the following from the administrative law judge's Nonfinal Order:

> Paragraph (5) The identification of riparian zones attributable to particular Lots does not preclude a person who owns adjacent Lots from treating them as a single riparian zone for purposes of a boat landing and pier placement. A person with adjacent Lots may use the two six-foot-wide boat landing attributable to those Lots, and the resulting riparian zones, as a single riparian zone that is twelve feet wide. Also, two persons who own adjacent Lots may agree to combine their six-foot-wide boat landings into a single riparian zone that is twelve-feet wide. Three persons who own adjacent Lots may agree to use their six-foot-wide boat landings as a single riparian zone that is 18-feet wide and so on.

Petitioners' Brief in Support of Their Motion for Summary Judgment, pgs. 8-9, Affidavit of Jason M. Kuchmay, Exhibit A.

38. With respect to its determination to strike Paragraph 5 of the Nonfinal Order, the AOPA Committee of the Commission expressly stated that "the Paragraph 5 and Paragraph 6 issues are not ripe for our determination." Petitioners' Brief in Support of Their Motion for Summary Judgment, Exhibit 13, pg. 56 (emphasis added).

39. That the matter was not ripe for inclusion in the *Spaw* Final Order means simply that and nothing more.

[VOLUME 13, PAGE 116]

Identifying the Real Property from which the Riparian Easements Originate:

40. Primary to the continued evaluation of the dispute presented, it is imperative that the servient estate associated with the riparian easements be identified and defined. Riparian rights flow from a "physical relationship of a body of water to the abutting land" *Meyers Subdivision POA v. DNR and Kranz*, 12 CADDNAR 282, 283, (2011). With respect to Big Long Lake, which is a public freshwater lake as defined at Indiana Code § 14-26-2-3, riparian rights may result from actual ownership of land abutting a shoreline or from "owner[ship] of an interest in land sufficient to establish the same legal standing as the owner of land, bound by a lake." 312 IAC 11-2-19.

41. At this juncture it is important to emphasize that Indian Trail "exists **between the shoreline or water line of Big Long Lake** and the entire lengths of Block 6, Block 7, and Block 8." *Spaw* at 239, and "**border[s]** the shoreline of Big Long Lake", *Spaw* at 248. In contrast, the language of the Plat of Long Lake Park states that "[e]ach lot owner shall be entitled to an easement **on the Lake Shore** six feet in width for a boat landing." *Spaw* at 238.

42. The importance of this distinction is that Indian Trail, and the co-tenanancy existing amongst all Lot owners within Long Lake Park in association with Indian Trail, ceases on the landward side of the shoreline of Big Long Lake.

43. The Petitioners' statement that the riparian easements "[emanate] from the Indian Trail within Long Lake Park…" is incorrect. Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 3.

44. Instead, each appurtenant riparian easement begins, and exists, solely upon a linear strip of property located **on** the shoreline of Big Long Lake.

45. The "shoreline or water line" of Big Long Lake is established by IC 14-26-2-4(1) at 956.21 feet, mean sea level. *Spaw* at 234, see also "Orders Regarding Legal Elevation of Big Long Lake and Regarding Motion to Withdraw Appearance on Behalf of Jennifer H. Miller and Zachary A. Miller" (September 16, 2009)".

46. It is the shoreline of Big Long Lake from which the riparian easements find their source.

Identifying the Owner(s) of the Servient Estate Associated with the Riparian Easements:

47. A second crucial determination, which was also established in *Spaw*, is the identification of the owner of the servient estate associated with the riparian easements.

48. "Lee J. Hartzell ("Hartzell") was a riparian owner along Big Long Lake in LaGrange County, Indiana. On June 12, 1923, Hartzell caused recordation with the LaGrange County

Recorder of a plat for Long Lake Park." *Spaw* at 238. By virtue of his creation of the plat for Long Lake Park and his grant of the riparian easements to each of the individual Lot owners, Hartzell "was the servient tenant and continued to be the riparian owner." *Spaw* at 240.

49. Though there was never a specific transfer of Hartzell's interest in the servient estate and no specific disposition of his interest in Long Lake Park was provided for by Hartzell, upon Hartzell's death, through the execution of the "Last Will and Testament of Lee J. Hartzell" he gave, granted and bequeathed "all the rest and residue" of his estate to the Indiana Masonic Home. Consequently, the Indiana Masonic Home became the successor in interest to Hartzell's servient estate associated with the riparian easements. *Spaw* at 239.

50. It is important to note here that the "successor in interest to Hartzell relinquished any claim to relief based on the plat…" *Spaw* at 240. Therefore, while the Indiana Masonic Home remains the fee owner of the property burdened with the riparian easements, it has denied any interest in the servient estate.

51. Neither the Petitioners nor any other Lot owner within Long Lake Park are either the owners of the servient estate associated with the riparian easements or riparian owners on Big Long Lake.

Relational Impact of the Construction Authorized by the Permits Upon the Dominant and Servient Estates Associated with the Riparian Easements:

52. The Indiana Court of Appeals on January 11, 2012, stated:

> It is well established that easements are limited to the purpose for which they are granted. The owner of an easement, known as the dominant estate, possesses all rights necessarily incident to the enjoyment of the easement. The owner of the property over which the easement passes, known as the servient estate, may use his property in any manner and for any purpose consistent with the enjoyment of the easement, and the dominant estate cannot interfere with the use. All rights necessarily incident to the enjoyment of the easement are possessed by the owner of the dominant estate, and it is the duty of the servient owner to permit the dominant owner to enjoy his easement without interference. The servient owner may not so use his land as to obstruct the easement or interfere with the enjoyment thereof by the owner of the dominant estate. Moreover, the owner of the dominant estate cannot subject the servient estate to extra burdens, and more than the holder of the servient estate can materially impair or unreasonably interfere with the use of the easement.

Rehl v. Billetz, 2012 Ind. App. LEXIS 9, *12-13, (2012).

53. "Appurtenant easements are inseparably united to the land to which they are incident. 'They are in the nature of covenants running with the land.'". *Spaw, supra* at 246, citing *Schwartz v. Castleton Christian Church, Inc.*, 594 N.E.2d 473 (Ind. App. 1992).

54. The Petitioners are correct that "a right-of-way appurtenant to one parcel of land may not be subjected to use by other premises to which the easement is not appurtenant," *Selvia v. Reiteyer*, 295 N.E.2d 869, 874, (Ind. App. 1973) and that the "owner of the dominant estate cannot by any act of his own, independent of the consent of the owner of the servient estate, use the easement or authorize it to be used for the benefit of any lands other than these to which it adheres." *Kixmiller v. Baltimore & O.S.W.R. Co.*, 111 N.E.401, 403, (Ind. App. 1916).

[VOLUME 13, PAGE 117]

55. In *Selvia*, the appellant was the owner of two adjoining parcels of real property, one parcel that under previous ownership had been in unity with the property owned by the appellees and a second parcel that had not. The court established an implied easement of necessity over the appellees' property only with respect to the appellant's property that had previously been in unity with the property of the appellees. The court, acknowledging that "an easement cannot be implied over the land of a stranger" refused to imply an easement for the benefit of appellant's second parcel of property thereby denying the appellant the ability to use the implied easement to reach appellant's second parcel of property. The court reasoned that an easement "appurtenant to one parcel of land may not be subjected to use by other premises to which the easement is not appurtenant." *Selvia* at 874, additional citation omitted.

56. In many of the cases cited by Petitioners the factual situation is the same as *Selvia* with the owner of the dominant estate unilaterally increasing the burden upon the servient estate through application of the easement to additional lands. *Halsrud v. Brodale*, 72 N.W.2d 94, (Iowa 1955), (A drainage easement that by its express terms effected drainage of one section of property could not be used to effect drainage of an additional section of property.), *Penn Bowling Recreation Center v. Hot Shoppes*, 179 F2d. 64, (D.C. Cir. 1950), (The use of an easement was inappropriate for accessing a bowling and recreation center that had been constructed partially upon the dominant estate and partially upon property acquired two years after the easement was obtained.), *McCullough v. The Broad Exchange Co.*, 101 A.D. 566 (N.Y.A.D. 1905), (Easements for the use of an open area and alley for ingress and egress to a specifically identified parcel of property cannot be used by the dominant tenant for the benefit of later acquired properties.).[1]

57. The state of the law remains that a servient estate shall be burdened only with respect to the identified dominant estate.

58. It is equally the situation that the holder of an easement may not subject the easement to expanded uses not contemplated by the parties creating the easement. *Kwolek v. Swickard*, 944 N.E.2d 564, (Ind. App. 2011) (the owners of the dominant estate were prohibited from parking within an easement that was granted for the "limited purpose of ingress and egress"), *Drees Co. v. Thompson*, 868 N.E.2d 32, (Ind. App. 2007), (considering the

[1] Dicta from *Kixmiller v. Baltimore and Ohio Southwestern Railroad Co*., 111 N.E. 401, was cited by petitioners but is not considered in detail here because the dicta related to an issue determined by the trial court that did not require a determination on appeal.

increased use of an easement by the owner of the servient estate who planned to subdivide and develop his property).

59. While specific generally accepted principles of law are involved in determining the intended purpose of easements, those matter are not discussed here because the purpose of the riparian easements at issue herein was previously determined in *Spaw*.

60. Each riparian easement at issue here is for "an unimproved or improved place from which boats may be used to deliver passengers or goods. Specifically prohibited was the placement of a boathouse. Examples of improvements that could be made by a lot owner included the placement of a pier or wharf." *Spaw* at 243.

61. The administrative law judge in *Spaw* observed that "[n]either the claimants nor the respondents[2] advocate adherence to the six-foot wide boat landing easements provided in the plat for each Lot owner." At 246. Further discussion regarding changes resulting from the passage of time and societal development occurs within a footnote to the *Spaw* decision as follows:

> The respondents urge in their post-hearing brief that the six-foot wide easements created 'by Lee Hartzell are a buggy whip in a Corvette world—although they may have served a legitimate purpose at one time, they are no longer feasible or workable and, in fact, hinder and impair the very benefit that they purport to provide. Under these circumstances, which are really not in dispute, the Restrictions fail.' … In 1923 when Hartzell provided six-foot easements for boat landings, they were of modest utility. He must have known then that there were many boats which could not be launched from a six-foot easement. The appetite for lake usage has undoubtedly increased since 1923, but appetite is not and cannot be the measure of an easement. Alleys are not expressways, but alleys still have utility."

Spaw at 246, fn5

62. "The proper function of a particular easement should be gleaned by contemplating not the character of the traffic intended to travel the way, but rather the purpose to be served by the traffic." *Brock v. B & M Moster Farms, Inc.*, 481 N.E.2d 1106, 1108, (Ind. App. 1985). This philosophy has proved useful to the courts in determining the appropriate construction of an otherwise unambiguous easement "authorizing use of the right-of-way by 'wagons, horses and footpassers'" to be an easement granting general ingress and egress rights. *Id*., referencing *Jeffers v. Toschlog*, 383 N.E.2d 457, (Ind. App. 1978) in which "*an access easement created in 1907 where 'teams and wagons' were authorized to travel the way in conducting their business*" to be an easement "*for the purpose of permitting vehicles to pass through the driveway*."

63. *Brock* and *Jeffers* reflect the preference of the courts to construe the situation of a "buggy whip in a Corvette world" observed by the Respondents in *Spaw* with respect to easements

[2] Many of the Petitioner and Applicant Respondents in the instant proceeding were Claimants or Respondents in *Spaw*.

containing "latent ambiguity[ies]" created by "the mere passage of time and development of society" instead of the terminating the easement. In fact, the *Brock* court expressly notes that "in case of doubt or uncertainty, the grant of an easement will ordinarily be construed in favor of the grantee." *Brock* at 1108.

64. That watercraft design has changed since the creation of the riparian easements 1923 is not the question any more than that the primary means of travel has changed since 1911 from "wagons, horses and footpassers" and "teams and wagons" to modern day automobiles. The important question is that the purposes that may be put to the use of watercraft remains the same today as in 1923 just as the purpose of wagons and horses equivocates today's use of automobiles. Thus the purpose of the riparian easements to provide "an unimproved or improved place from which boats may be used to deliver passengers or goods… Examples of improvements that could be made by a lot owner included the placement of a pier or wharf" also remains consistent from 1923 to the present. *Spaw* at 243. Consequently, the intended use of the dominant estate and the burden to be borne by the servient estate remains consistent though through the passage of time there have been developments in watercraft design, as well as mooring facilities for those watercraft that may alter the appearance of the use.

65. The Permits at issue clearly authorize a use consistent with the predetermined purpose of the riparian easements.

66. In the process of accommodating modern usage of easements it remains the case that the "easement cannot be changed to subject the servient estate to a greater burden than was originally agreed upon without the consent of the owner of the servient estate." *Brock* at 1108. In Brock, the holder of the dominant estate was disallowed from paving the right-of-way granted by the easement or from subdividing the dominant estate in such a manner that the easement would be subjected to increased traffic. The court noted that only those improvements and repairs may be made, "which are reasonably necessary to make the grant of the easement effectual." *Brock at 1109,* citing *Litzelswope v. Mitchell,* 451 N.E.2d 366, (Ind. App. 1983).

[VOLUME 13, PAGE 118]

67. It is not disputed that:

> the [riparian] easements associated with Lots 92, 93, 94, 95, 96 and 97 in Block 8 of Long Lake Park are plainly appurtenant, unique to, and solely for the benefit of those specific individual lots, and are <u>not</u> appurtenant to any other lots within Block 8 or any other part of Long Lake Park. Similarly, the [riparian] easements associated with Lots 81, 82, 83, 84, 85 and 86 in Block 8 of Long Lake Park are plainly appurtenant, unique to, and solely for the benefit of those specific individual lots, and are <u>not</u> appurtenant to any other lots within Block 8 or any other part of Long Lake Park. Likewise, the [riparian] easements associated with Lots 65, 66, 67, 68 and 69 in Block 7 of Long Lake Park are plainly appurtenant, unique to, and solely for the benefit of those specific individual lots, and are <u>not</u> appurtenant to any other lots within Block 7 or any other part of Long Lake Park.

Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 14.

68. With respect to Permit PL-21697, the pier authorized for construction includes a three foot walkway extending 100 feet lakeward from its affixed location at the shoreline within a 36 foot expanse of riparian easements created by the combining of six individually owned six-foot riparian easements. Applicants' Motion for Summary Judgment, Exhibit B. The three foot walkway will be located 20 feet from the boundary of the riparian zone on one side and 18 feet from the riparian zone boundary on the other side. *Id*. The pier is designed to provide mooring space for seven boats and provide an additional "small boat and jet ski area" for the use by the owners of all six riparian easements. *Id*. The practical consequence of this pier configuration is that one six-foot riparian zone will be used to provide access to boat landings associated with six Lots.

69. Through issuance of Permit PL-21704, the Department has authorized the construction of a pier consisting of a three foot wide walkway extending 100 feet lakeward from the shoreline. *Applicants' Motion for Summary Judgment, Exhibit C*. The pier appears to be designed in a manner that will provide mooring space for nine watercraft and will be used by the six riparian easement owners who anticipate combining their individual riparian easements to create a 36 foot length of shoreline. *Id*. Again, the result is that one riparian easement will be utilized to provide access to boat landings for six Lots.

70. Similar to Permits PL-21697 and PL-21704, Permit PL-21717 authorizes the placement of a three foot walkway extending 70 feet lakeward with a boatlift to be located at the lakeward end. Applicants' Motion for Summary Judgment, Exhibit D. The pier is proposed to be shared by the owners of five Lots, who by virtue of their Lot ownership hold a dominant estate in five riparian easements that they plan to bind together in creating a 30 foot section of the shoreline. *Id*. Once more, the pier to be constructed uses one riparian easement to provide access to boat landing associated with five Lots.

71. Each of the Permits, as issued, authorize one three foot walkway located on one riparian easement to provide access to a pier serving six Lots, in the cases of PL-21697 and PL-21704, and five Lots, in the case of PL-21717. Therefore, the servient estate associated with the one riparian easement located on the shoreline of Big Long Lake where the pier walkway is to be located would, in fact, be burdened beyond what was anticipated by the grantor of the riparian easements.

72. A strict construction of common law applicable to appurtenant easements indicates that the "approval of the Permits, therefore, authorized the Permittees to do that which Indiana common law plainly forbids them to do…", which is to burden one riparian easement with the three foot walkway serving four, or five, additional riparian easements. Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 14.

73. To the extent that the construction authorized by the Permits impose additional burdens upon one servient estate, or one six foot riparian easement, for the benefit of multiple Lots within Long Lake Park, there appears to be a valid contention, based solely upon a strict

application of common law principles relating to appurtenant easements, that one riparian easement is being burdened beyond the expectation of the grantor of the easement.

74. It is interesting to note however, that because the riparian easement and thus the servient estate exists solely upon a two-dimensional, linear stretch of shoreline and no owner of any riparian interests owns any portion of Big Long Lake, the Applicant Respondents may easily overcome the strict application of common law principles associated with appurtenant easements here by simply constructing a walkway running parallel to and lakeward of the shoreline for the full width of the combined riparian easements from which the one walkway extending perpendicularly lakeward will protrude. In this manner, each individual riparian easement would be equally burdened by supporting the walkway running parallel to the shoreline by which each riparian easement would be provided access to the perpendicular walkway by which individual mooring stations could be accessed. The action that might be taken by the Applicant Respondents to overcome the strict application of common law through the additional construction of a walkway parallel to the shoreline creates a simply absurd result in this case.

Inapplicability of Common Law With Respect to Easement Conveying Riparian Rights

75. Notwithstanding paragraphs 72 and 73, it is determined that strict application of common law in this instance is countermanded by Indiana Code §§14-26 et seq., commonly referred to as the Lakes Preservation Act, and applicable administrative rules found at 312 IAC 11.

76. In *Bei Bei Shuai v. State of Indiana*, 2012 Ind. App. LEXIS 43, the Indiana Court of Appeals stated:

> We recognize English common law unless our legislature explicitly abrogates it: The law governing this state is declared to be:
>
> Sec. 1. The law governing this state is declared to be:
>
> First. The Constitution of the United States and of this state.
>
> Second. All statutes of the general assembly of the state in force, and not inconsistent with such constitutions.
>
> Third. All statutes of the United States in force, and relating to subjects over which congress has power to legislate for the states, and not inconsistent with the Constitution of the United States.
>
> Fourth. The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth,) and which are of a general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section.

At *28 citing Indiana Code § 1-1-2-1.

77. With respect to Indiana's public freshwater lakes the Indiana General Assembly has enacted legislation that states:

> Sec. 5…
> (c) The:
> (1) natural resources and the natural scenic beauty of Indiana are a public right; and
> (2) **public of Indiana has a vested right in** the following:
> **(A) The preservation, protection, and enjoyment of all the public freshwater lakes of Indiana in their present state.**
> **(B) The use of the public freshwater lakes for recreational purposes.**
> (d) **The state:**
> **(1) has full power and control of all of the public freshwater lakes** in Indiana both meandered and unmeandered; and
> (2**) holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes**.
> (e) **A person owning land bordering a public freshwater lake does not have the exclusive right to the use of the waters of the lake or any part of the lake.**

Indiana Code § 14-26-2-5.

78. Therefore, "[w]ith enactment of the Lakes Preservation Act, the **common law privileges of a riparian owner have been modified by public trust legislation** recognizing the public's right to preserve the natural scenic beauty of our lakes and their recreational values". Indiana Code § 14-26-2-5; *Majewski v. DNR*, 12 CADDNAR 299, 302, (2011). (emphasis added). "Riparian landowners, however, continue to possess their rights with respect to a public freshwater lake, but their rights are now statutory and must be balanced with the public's rights." *Lake of the Woods v. Ralston*, 748 N.E.2d 396, 401, (Ind. App. 2001).

79. With respect to easements involving riparian rights on waters under the jurisdiction of the Lakes Preservation Act, it is first the Constitution of the United States and of this state followed by the statutes enacted by the general assembly that will control. There being no Constitutional issue raised by any party, the matter of the Department's issuance of the Permits to the Applicant Respondents is appropriately governed by the Lakes Preservation Act and AOPA along with rules adopted at 312 IAC 11-1 through 11-5 for the purpose of implementing the Lakes Preservation Act and 312 IAC 3 for the purpose of implementing AOPA.

80. The rights of riparian landowners and restrictions upon those rights, relating to a public freshwater lake apply equally to "the owner of an interest in land sufficient to establish the same legal standing as the owner of land, bound by a lake." 312 IAC 11-2-19.

81. By virtue of the *Spaw* decision, all the Lot owners within Long Lake Park, including the Applicant Respondents, as holders of the riparian easements, possess an ownership interest in land, a six-foot, two-dimensional linear stretch of shoreline along Big Long Lake, sufficient to establish the same legal standing as the fee owner of that land such that they may seek and be granted the Permits.

82. Activities occurring lakeward of the shoreline of Big Long Lake in conjunction with the Permits is entirely within the governance of the Department in fulfilling its obligation to hold Indiana's public freshwater lakes in trust for the benefit of all citizens of Indiana.

The Petitioners Lack Standing to Initiate a Proceeding Based Upon Improper Burdens Upon the Servient Estate.

83. The Petitioners' challenge to the issuance of the Permits stems from the incorrect premise that the riparian easements "emanate from the Indian Trail". Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 3. From this erroneous point of beginning, the Petitioners conclude that Indian Trail, in which they share co-tenancy in the dominant estate, is the servient estate that will be subjected to increased burdens as a result of the Applicant Respondents' construction activities as authorized by the Permits.

84. The petitioners even go so far as to erroneously state that "[b]y virtue of the lot owners' ownership in the shoreline property of the Indiana Trail, by operation of Indiana law, these co-owners are riparian owners." This statement by the Petitioners represents a complete mischaracterization of the LaGrange County Circuit Court's determination in *Altevogt* that the lot owners are **co-tenants** of Indian Trail. The lot owners within Long Lake Park are co-tenants of the dominant estate in Indian Trail…this does not render them either riparian owners or the owners of the servient estate.

85. Instead, as was discussed in paragraph 44 the appurtenant riparian easements find their source on the shoreline of Big Long Lake, the point at which the easement in gross to the Indian Trail ceases.

86. The Plat to Long Lake Park grants to each individual Lot owner the dominant estate associated with the riparian easement that corresponds to the Lot owned in a numerical sequence and that ownership is solely and exclusively granted to one individual Lot owner and the rights to the dominant estate associated therewith exists by and between the individual lot owner and the owner of the servient estate, who is the Indiana Masonic Home.

87. The Petitioners are not the owners of the servient estate associated with the riparian easements nor do they possess any legal interest in the servient estate associated with the riparian easements.

88. Therefore, to the extent that the Petitioners' challenge to the Department's issuance of the Permits to the Applicant Respondents relates to increased burdens placed upon the servient estate, which is owned by the Indiana Masonic Home, they are not proper parties to raise the issue.

89. The instant proceeding is governed by Indiana Code § 4-21.5-3-5. A person may seek administrative review under Indiana Code § 4-21.5-3-7(a), which states:

(a) To qualify for review of a personnel action to which IC 4-15-2 applies, a person must comply with IC 4-15-2-35 or IC 4-15-2-35.5. To qualify for review of any other order described in section 4, 5, or 6 of this chapter, a person must petition for review in a writing that does the following:

(1) States facts demonstrating that:

(A) the petitioner is a person to whom the order is specifically directed;

(B) the petitioner is aggrieved or adversely affected by the order; or

(C) the petitioner is entitled to review under any law.

90. "Essentially, to be 'aggrieved or adversely affected,' a person must have suffered or be likely to suffer in the immediate future harm to a legal interest, be it a pecuniary, property, or personal interest." *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806, 810, (Ind. 2004).

91. The Indiana Masonic Home, the sole owner of the servient estate associated with the riparian easements, is the only proper person to make such a claim and it has not so acted.

[VOLUME 13, PAGE 120]

INTERFERENCE WITH PETITIONERS' RIGHTS AS CO-TENANTS IN THE DOMINANT ESTATE ASSOCIATED WITH INDIAN TRAIL

92. While the Petitioners are not owners of the servient estate associated with the riparian easements and are also, as determined previously at paragraph 84, not either co-owners of the servient estate associated with the Indian Train or riparian owners by virtue of their co-tenancy of the dominant estate associated with the Indian Trail, they are co-tenants, along with all other Lot owners in Long Lake Park, of the dominant estate interest in Indian Trail, which lies immediately adjacent to the riparian easements. Pursuant to Indiana Code § 4-21.5-3-7(a) they may pursue administrative review by alleging that they are "aggrieved or adversely affected" by impacts of the Permits and the Applicant Respondents' planned construction upon their legal interests in the Indian Trail. *Huffman*, *supra*.

93. The subject of inquiry here relates to whether the construction authorized by the Permits, or any one of the Permits, will in any manner impede or interfere with the intended use of Indian Trail by other Lot owners within Long Lake Park who are co-tenants of the dominant estate interest in Indian Trail.

94. Indian Trail "exists between the shoreline or water line of Big Long Lake and the entire lengths of Block 6, Block 7, and Block 8." *Spaw* at 239. Every Lot owner within Long Lake Park is entitled to use Indian Trail as a walkway.

95. In *Spaw* it was stated that the riparian easements "traversed Indian Trail and extended to the lakeshore of Big Long Lake", at 241, however, it is also clear from *Spaw* and *Altevogt*, as the Petitioners' aptly conclude, that "each owner of a lot within the Plat of Long Lake Park owns the Indian Trail as co-tenants, together with all other such owners of lots within Long Lake Park" and that each riparian easements "runs consecutively along the shoreline of Big Long Lake …" Petitioners' Motion for Summary Judgment, pg. 3.

96. The riparian easements, which abut Indian Trail, are located on the shoreline of the Block of Long Lake Park by virtue of the location of the Lot owned. Therefore, the Lot owners within Block 7 may also use Indian Trail to access their individual six-foot riparian easements. Likewise the Lot owners within Block 8 will access their individual riparian easements by use of Indian Trail. The design of the Plat, the granted easement in gross to Indian Trail and the grant of appurtenant easements to each Lot owner within Long Lake Park obligate this conclusion. See *Spaw*.

97. Every individual Lot owner may traverse the Indian Trail for any reason and will certainly be required to traverse Indian Trail to access their individual riparian easement, not by virtue of the fact that their individual riparian easement extends across a portion of Indian Trail but instead by virtue of the easement in gross that every Lot owner in Long Lake Park maintains in Indian Trail.

98. Whether the Applicant Respondents use Indian Trail to access multiple individual six-foot riparian easements or to access one pier constructed on a length of lakeshore equaling the combined number of six-foot riparian easements, use of Indian Trail will remain as a walkway and a means of access to the riparian easements of the Lot owners within Long Lake Park, including the Applicant Respondents. This use was clearly anticipated by the grant contained within the Plat to Long Lake Park. *Spaw* and *Altevogt*.

99. Co-owners of a dominant estate may not interfere with the use of the easement by other co-owners. *Kwolek & Drees*. Therefore, the Applicant Respondents may not do anything upon Indian Trail that interferes with the use of Indian Trail by any other Lot owner within Long Lake Park.

100. The exact shoreline point that forms the lakeward boundary of Indian Trail is the beginning, and essentially the end, of the individual, two-dimensional, linear riparian easements that are owned by each Lot owner within Long Lake Park. The language establishing the riparian easements dictates that the Applicant Respondents, as well as all other Lot owners in Block 7 and Block 8 of Long Lake Park, possess no authority to construct piers or take any other action consistent with their enjoyment of their riparian easements at any point except "on" the shoreline of Big Long Lake. *Spaw* at 238.

101. The Department's "jurisdiction does not extend outside the 'shoreline or water line' (under IC 14-26-2-4)." *Pipp v. Spitler, et al.*, 11 CADDNAR 39, 41 (2007).

102. A review of the Permits reveals that each of the piers authorized for construction "will extend …lakeward of, and perpendicular to, the legal shoreline", Petitioners' Motion for Summary Judgment, Exhibit 2, pg.1; Applicant Respondents' Motion for Summary Judgment, Exhibit C(G), pg.1; and Applicant Respondents' Motion for Summary Judgment, Exhibit D(G), pg. 1.

103. In keeping with the Department's jurisdictional authority and the limitations of the riparian easements, the Permits do not authorize any activity landward of the shoreline of

Big Long Lake. Therefore, neither the Permits nor the pier construction authorized by the Permits encroaches in any way upon the Indian Trail. Consequently, there is absolutely no evidence that either the Permits or the authorized pier construction will interfere with the use of the Indian Trail by any co-tenant of that easement, including the Petitioners.

SUBVERSION OF GROUP PIER PERMITTING PROCESS

104. The Petitioners maintain that the Applicant Respondents should have been obligated obtain group pier permits under 312 IAC 11-4-8. A group pier is defined at 312 IAC 11-2-11.5 as:

> Sec. 11.5. "Group pier" means a pier that provides docking space for any of the following:
> (1) At least five (5) separate property owners.
> (2) At least five (5) rental units.
> (3) An association.
> (4) A condominium, cooperative, or other form of horizontal property.
> (5) A subdivision or an addition.
> (6) A conservancy district.
> (7) A campground.
> (8) A mobile home park.
> (9) A club that has, as a purpose, the use of public waters for:
> (A) boating;
> (B) fishing;
> (C) hunting;
> (D) trapping; or
> (E) similar activities.

[VOLUME 13, PAGE 121]

105. It is an accurate statement that PL-21697 and PL-21704 authorize the construction of one pier by combining "six (6) separate, legally platted lots within Long Lake Park…" Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 28, and in the case of PL-21717, five separately platted lots within Long Lake Parke will be combined for purposes of constructing the authorized Pier. Applicants' Motion for Summary Judgment, Exhibit D.

106. The Petitioners reason that the Applicant Respondents' "[a]pplications should be been evaluated within the 'Group Pier' definition, either as an 'association' under 312 IAC 11-2-11.5(3) or under 312 IAC 11-2-11.5(1)." Petitioners' Brief in Support of Their Motion for Summary Judgment, pg. 30.

107. The application of 312 IAC 11-2-11.5(1) requires the existence of "[a]t least five (5) separate property **owners**."

108. The property associated with PL-21697 includes six lots owned by four separate property owners. Applicants' Motion for Summary Judgment, Exhibit B. The property associated

with PL-21704 is comprised of six lots owned by four separate property owners. Applicants' Motion for Summary Judgment, Exhibit C. The property associated with PL-21717 consists of five lots owned by two separate property owners. Applicants' Motion for Summary Judgment, Exhibit D.[3]

109. The evidence is crystal clear that there are not five separate property **owners** associated with any of the Permits and the Petitioners do not even attempt to dispute this fact.

110. Instead the Petitioners resort to a "hypothetical example" that "any number of riparian owners could band together with common ownership of multiple lots or dwellings to apply for an individual permit to serve as many watercraft as physically possible."

111. It is agreed that hypothetically, the Petitioners' scenario could potentially occur. The administrative law judge posits that given a sufficient amount of time and incentive, anyone could fabricate a hypothetical situation in which the intent of nearly any statute or administrative rule is abrogated. Such hypothetical scenarios will not defeat the clear and plain language of a statute or administrative rule.

112. The first and foremost rule of statutory construction is that where a statute or administrative rule is unambiguous on its face, any construction of that statute or rule is inappropriate. *F.D. McCrary Operator, Inc. v. DNR*, 10 CADDNAR 75, 79 (2005) citing *Alcoholic Beverage Commission v. Osco Drug, Inc.*, 431 N.E.2d 823, (Ind. App. 1982) and *Sloan v. State*, 947 N.E.2d 917, (Ind.) 2011).

113. The Petitioners also maintain that the act, on the part of more than one of the Applicant Respondents of entering into an agreement to coordinate their lake access, created three "associations" of Applicant Respondents each of which were obligated to obtain group pier permits as "associations" under 312 IAC 11-2-11.5(3).

114. As noted by the Petitioners there exists no legal definition of the word "association" in the context of the Lakes Preservation Act and consequently, the plain and ordinary meaning of the word is appropriately applicable.

115. "Association" is defined as "[t]he act of a number of persons in uniting together for some special purpose or business. It is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object…." Black's Law Dictionary, Sixth Edition. West Publishing Co. 1990.

116. While viewed solely in terms of the definition of "association" it appears as though the three groups of Applicant Respondents that applied for and were issued the Permits should have been obligated to obtain group pier permits under 312 IAC 11-4-8. However, such a result is inconsistent with the plain and unambiguous language of 312 IAC 11-2-11.5(1), which clearly exempts from the group pier definition those piers providing docking space

[3] It is noted that certain of the properties are co-owned as husband and wife or other co-tenancy. This does not alter the analysis of this issue.

for four or fewer separate property owners. The application of 312 IAC 11-2-11.5(3) espoused by the Petitioners would effectively render 312 IAC 11-2-11.5(1) meaningless.

117. Statutory construction "requires that every word be given effect, and no part be held meaningless. *Union Township School Corporation v. State ex rel. Joyce,* 706 N.E.2d 183, (Ind. App. 1998). Where the plain and customary meaning of the words will defeat the intent of the legislature, the words may be afforded a particular or technical meaning. *Johnson County Farm Bureau Co-Op, Inc. v. Indiana Department of State Revenue,* 568 N.E.2d 578, affirmed 585 N.E.2D 1336 (Ind. 1992). Any such statutory construction requires that a determination be made through a consideration of the entire act. *Ernst and Ernst v. Underwriters National Assurance Company,* 381 N.E.2d 897 (Ind. App. 2 Dist. 1978)." *F. D. McCrary, supra*

118. The only means by which to give effect to both 312 IAC 11-2-11.5(1) and 312 IAC 11-2-11.5(3) is to conclude that the term "association" may relate to owners of separate property interests but only when the number of owners of separate property interests exceed four.[4]

119. The Applicant Respondents were not obligated to obtain group pier permits under 312 IAC 11-4-8.

CONSIDERATION OF THE APPLICANT RESPONDENTS' PERMIT APPLICATIONS UNDER INDIANA CODE § 14-26-2-23

120. Under Indiana Code § 14-26-2-5, it is the Department that "holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes." By this legislative grant of authority to the Department, a person owning land bordering a public freshwater lake, including a person, such as the Lot owners to Long Lake Park, who possess a dominant riparian interest in property bordering a public freshwater lake no longer possess an "exclusive right to use the waters of the lake or any part of the lake." Instead, the "state has full power and control of all of the public freshwater lakes in Indiana."

121. The piers proposed and authorized for construction by the permits would, by all appearances, qualify for placement under a general license provided for at Indiana Code § 14-26-2-23(e)(2)(B) and 312 IAC 11-3-1(b) except for the litigation in *Spaw* by which the piers are required to be permitted by the Department in accordance with Indiana Code §§ 14-26-2 and 312 IAC 11-1 through 312 IAC 11-5. Of particular note is the applicability of Indiana Code § 14-26-2-23(c) and 312 IAC 11-3-3. [5] *Spaw* at 233.

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[4] The administrative law judge observes that the most likely intended application of 312 IAC 11-2-11.5(3) was to homeowners or property owners associations. However, if that was the intended meaning it would be advisable to offer such a definition for clarification.

[5] The Petitioners state that "…regulations of the Indiana Department of Natural Resources implementing this statutory mandate" are found at 312 IAC 6-4-5, which is incorrect. The administrative law judge notes that 312 IAC 6-4-5 is applicable to the "placement and maintenance of a pier is authorized *without a written license* issued by the department under *IC 14-29-1*. The inapplicability of 312 IAC 6-4-5 is evident immediately by the fact that at issue here is the issuance of a written license; not the construction of a pier without a written license. Furthermore, the

122. Indiana Code § 14-26-2-23(c) states:

> (c) The department may issue a permit after investigating the merits of the application. In determining the merits of the application, the department may consider any factor, including cumulative effects of the proposed activity upon the following:
>
> (1) The shoreline, water line, or bed of the public freshwater lake.
>
> (2) The fish, wildlife, or botanical resources.
>
> (3) The public rights described in section 5 of this chapter.
>
> (4) The management of watercraft operations under IC 14-15.
>
> (5) The interests of a landowner having property rights abutting the public freshwater lake or rights to access the public freshwater lake.

123. The Permits were issued to the Applicant Respondents based upon the grant of riparian rights contained within the plat of Long Lake Park as determined in *Spaw*. 312 IAC 11-2-19, *Spaw* at 241.

124. The Permits were issued for construction of piers within appropriate riparian zones as established in *Spaw*. *Spaw* at 243 – 244, Applicants' Motion for Summary Judgment, Exhibit E.

125. The applications for the Permits were evaluated by Nathan D. Thomas ("Thomas"), who has been the Lakes Permitting Biologist for the Department since February 2010. In assessing the applications, Thomas personally visited Big Long Lake and "observed the property and water where the piers contemplated by the applications would be located." Applicants' Motion for Summary Judgment, Exhibit F.

126. Thomas reported that the piers, as proposed in the applications, would have "minimal impacts on local fish, wildlife, and botanical resources" and, in fact, Thomas stated with respect to each of the Permit applications that the action of "[c]ombining easement rights and constructing piers to suit multiple property owners may be beneficial as it reduces the area of the lakebed that will be impacted by shadowing and boat traffic." Applicants' Motion for Summary Judgment, Exhibit F(A).

127. Further evaluation of the Permit applications conducted by the Department involved considerations of navigation and safety. Applicants' Motion for Summary Judgment, Exhibit G. This portion of the Departments evaluation was conducted by Conservation Officer Andy Runyon ("Runyon"), who personally visited the sites associated with the Permit applications and thereafter concluded that there were "no concerns with respect to navigation or safety." *Id.*

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licenses sought and obtained by the Applicant Respondents are under the jurisdiction of Indiana Code §§ 14-26-1 et seq., not Indiana Code §§ 14-29-1 et seq.

128. The remaining issue raised by the Petitioners relating to the Departments evaluation of the Permit applications under Indiana Code § 14-26-2-23 pertains to "the management of watercraft operations…" specified at Indiana Code § 14-26-2-23(c)(4) and the interrelated concern about the impact of the piers authorized by the Permits upon the "interests of a landowner having property rights abutting the public freshwater lake", such as the Petitioners, as specified at Indiana Code § 14-26-2-23(c)(5).

Discussion of Individual Permit PL-21697

129. The pier to be constructed under the authority of Permit PL-21697 will extend 100 feet lakeward of and perpendicular to the shoreline of Big Long Lake by virtue of a main three foot wide pier. From the south side of the main pier will extend four "winged" three foot wide by twenty foot long walkways. Because of their "winged" configuration, the twenty foot walkways will extend only eighteen feet from the main pier. From the north side of the main pier the construction design contemplates an eight foot wide area extending 31 feet lakeward for swimming with the mooring of four additional watercraft being provided on the north side of the main pier beginning at a point 31 feet lakeward of the shoreline and extending to the lakeward terminus of the main pier. Applicants' Motion for Summary Judgment, Exhibit B.

130. The pier will be located in front of Block 8 on the southern most end of the riparian easements as configured by the plat of Long Lake Park. Id., Applicants' Motion for Summary Judgment, Exhibit E(A)

131. The south side of the PL-21697 pier borders on open water where there exists no riparian easements and the north side of the pier abuts another lot owners' riparian easement. *Id.*

132. Permit PL-21697 provides no setback on the south side of the pier but does provide for a five foot setback on the north side of the pier. *Id*.

133. The riparian zone associated with PL-21697 is 36 feet in width. *Id.*

Discussion of Individual Permit PL-21704

134. Permit PL-21704 authorizes the construction of a main pier in front of Block 8 extending 70 feet lakeward of the shoreline of Big Long Lake by virtue of a three foot wide walkway. From the main pier, four "fingers" will extend perpendicular to a distance of 24 feet to the north and abut the waters of Big Long Lake associated with Sioux Drive. The "finger" located the furthest lakeward is proposed to be located at the terminal end of the main pier and at its center another three foot wide "finger" will extend an additional 24 feet lakeward. The south side of the pier will abut another Lot owner's riparian zone. Applicants' Motion for Summary Judgment, Exhibit C and Exhibit E(A).

135. The permit contains a special condition that a five foot setback must exist on the south side of the pier and also prohibits the mooring of watercraft on the south side of the pier. A four foot setback is also provided on the north side of the pier. *Id*.

136. The riparian zone associated with PL-21704 is 36 feet in width. *Id*.

Discussion of Individual Permit PL-21717

137. The pier authorized by PL-21717 consist of a three foot wide main pier extending 70 feet lakeward of the shoreline of Big Long Lake with unspecified mooring stations of 12 feet in width extending from the north side and 10 feet in width extending from the south side. Applicants' Motion for Summary Judgment, Exhibit D and Exhibit E(A).

138. The riparian zone associated with PL-21717 is 30 feet in width located in front of Block 7 beginning at the northern most riparian easement that abuts waters associated with Shawnee Drive. The south side of the associated riparian zones abuts a neighboring Lot owner's riparian zone. *Id*.

[VOLUME 13, PAGE 123]

139. There exists a setback on the south side of the pier of five feet and no setback on the north side of the pier. *Id*.

Navigation and Safety Concerns Associated with the Permits

140. The Commission has established "Riparian Zones within Public Freshwater Lakes and Navigable Waters," Information Bulletin #56 (Second Amendment), Legislative Services Agency, 20100331-IR-312100175NRA (March 31, 2010) (hereinafter referred to as IB #56) "to provide guidance for determining the boundaries of riparian zones within public freshwater lakes and within navigable waters. The guidance helps define the relationships between neighboring riparian owners, between easement holders and the fee ownership, and between riparian owners and public use of the waters." *At* pg. 2.

141. As previously stated, the riparian zones associated with the Permits were established in *Spaw*; however IB #56 is important to the evaluation of the Permits with respect to the existence of open water areas between piers, commonly referred to as "setbacks" or "buffer zones" that provide navigation lanes.

142. IB #56 specifies that "[t]o assist with safe navigation, as well as to preserve the public trust and the rights of neighboring riparian owners, there ideally should be 10 feet of clearance on both sides (for a total of 20 feet) of the dividing line between riparian zones. At a minimum, a total of 10 feet is typically required that is clear of piers and moored boats…" *Id.* at pg 2.

143. The guidance provided by IB #56 is consistent with a long line of precedent by which the Commission has required riparian owners to maintain buffer zones between piers, moored watercraft or other structures placed within a public freshwater lake. See generally *Havel & Stickelmeyer v. Fisher*, 11 CADDNAR 110, (2007); *Rufenbarger, et al. v. Blue, et al.*, 11 CADDNAR 185, (2007), *Roberts v. Beachview Properties, LLC, et al.*, 9 CADDNAR 163, (2004).

144. For purposes of the foregoing discussion it is important to highlight here, the fact that the riparian easements associated with Block 8 begin at the northern most point of Block 8, or the southern boundary of Sioux Drive, and continue by consecutive number corresponding to the Lot number. The riparian easement do not extend across the entire shoreline associated with Block 8, but instead the final riparian easement, associated with Lot numbered 97, is located near the center of Block 8's expanse of shoreline along Big Long Lake. Similarly the riparian easements associated with Block 7 begin at the northern most point, or the southern boundary of Shawnee Drive, and continue by consecutive numbering in a southerly direction. Again the riparian easements do no extend across the entire shoreline of Big Long Lake associated with Block 7.

145. It is equally important to emphasize here that the purpose of IB #56's specification of setbacks or buffer zones is to address "interference with the rights of the public or with the rights of other riparian owners. 'These rights can co-exist only if the riparian right to build a pier is limited by the rights of the public and of other riparian owners'". IB #56 *at pg. 2*, citing *Bath v. Courts,* 459 N.E.2d 72, 76, (Ind. App. 1984).

146. Pursuant to the plat of Long Lake Park there is no authority for any Lot owner to place a pier or other temporary structure or moor a watercraft except within the six foot riparian easements. No Lot owner acquired any riparian rights associated with the drives, alleys and walks, which would include Indian Trail, Sioux Drive and Shawnee Drive. See *Spaw*.

147. Consequently, to the extent that the piers authorized by the Permits abut waters lakeward of Sioux Drive, Shawnee Drive or that portion of the Indian Trail where no riparian easements exist, there is no competition and thus can be no interference between other persons with riparian interests.

148. It seem relevant to once again, in this moment, emphasize the incorrectness of one contention offered by Petitioners'. The Petitioners allege that the *Altevogt* decision awarded all Lot owners within Long Lake Park with not only riparian rights along Indian Trail but with co-ownership of the shoreline property of the Indian Trail. Petitioners' Reply in Opposition to Respondents' Motion for Summary Judgment, pg. 8. The LaGrange County Circuit Court offered no such award. Instead, all Lot owners in Long Lake Park were determined by the *Altevogt* decision to be "**co-tenants** as to all drives, alleys and walkways, including the Indian Trail." *At* pg. 20. A co-tenant is not the equivalent of either a co-owner of the land or a co-owner of the riparian interests.

149. With respect to the south side of the combined riparian zone associated with Permit PL-21697, where no riparian easements exist and the Lot owners within Long Lake Park possess no riparian interests, the setbacks specified by IB #56 are inapplicable.

150. With respect to the north side of the combined riparian zone associated with Permit PL-21704, which abuts waters lakeward of Sioux Drive, the setbacks specified by IB #56 are also inapplicable.

151. The same is true and the setback requirements specified by IB #56 shall not apply with respect to the north side of the combined riparian zone associated with Permit PL-21717, abutting Shawnee Drive.

152. However, the setback requirements established by IB #56 are, most certainly, applicable to the piers authorized for construction under each of the Permits as those piers have the capacity to interfere with the riparian rights of others. The Permits comply with IB #56 in this regard.

153. On the north side of the pier associated with PL-21697, where there exists another Long Lake Park Lot owner's riparian easement, a minimum five foot setback is required. Similarly, a minimum five foot setback is mandated by Permit PL-21704 and Permit PL-21717 on the south side of the piers authorized for constructed, again because the south side of these riparian zones abut another Lot owner's riparian easement.

154. The setback of a minimum of five feet associated with each of the Permits, combined with the imposition of a similar setback on the construction of a pier associated with the neighboring riparian zone, will establish, in an equitable manner, the "minimum" 10 foot area of open water specified by IB #56.

155. It is accurate that the five foot setbacks prescribed by the Permits do not meet the "ideally" imposed setback of "10 feet of clearance on both sides" but the setbacks are nonetheless in compliance with the guidance of IB #56.

156. Notwithstanding the determination that compliance with IB #56 has been achieved, it is acknowledged that IB #56 does not have the effect of law and the setbacks prescribed therein are merely guidance. In this context, the setbacks imposed in a particular situation can be less than the "ideal" 10 feet per side of a riparian boundary, as is the situation with the Permits. Arguably, then the required setback could feasibly be less than the "minimum" setback of five feet per side of the riparian boundary or even, as the Petitioners' observe, more than the "ideal" 10 feet per side.

[VOLUME 13, PAGE 124]

157. The ever important determination is not compliance with IB #56; the importance is with Indiana Code § 14-26-2-23(c)(4 & 5) and the determination that the pier construction is consistent with watercraft operations as set forth at Indiana Code §§ 14-15 and with public interests and private property rights associated with Big Long Lake within the confines of the facts and circumstances presenting in this proceeding.

158. The Petitioners and the Applicant Respondents have presented competing evidence on this issue that raises an issue of material fact inappropriate for determination on summary judgment.

159. The Applicant Respondents rely upon Runyon, a 32 year veteran Conservation Officer, who "routinely review[s] pier permit applications to assess any safety and navigation concerns prior to any decision by [the Department]." Applicants' Memorandum In

Opposition to Motion for Summary Judgment and Designation of Evidence, Exhibit A. From his evaluation of the Permits, familiarity with Big Long Lake, personal site visits and lengthy experience associated with this type of evaluation Runyon concluded that "there were no safety or navigation concerns with the Applications presented." *Id*.

160. The Petitioners offered the testimony of Brian C. Grieser ("Grieser"), whose affidavit testimony was not accepted as "expert testimony" under Indiana Rules of Evidence, Rule 702, but was accepted as the testimony of a "skilled witness" under Indiana Rules of Evidence, Rule 701. See Order with Respect to Applicants' Motion to Strike Affidavits of Brian C. Grieser, dated February 16, 2012.

161. Grieser, contrary to the opinion of Runyon, offered that under the circumstances surrounding the piers authorized by the Permits the minimum setbacks as specified in IB #56 are "not adequate to protect the safety of boats and those using Big Long Lake around the Pier." In more specific terms, Grieser offers that maneuvering a watercraft of 24 feet in length away from the 24 foot winged or perpendicular laterals associated with Permit PL-21697 and PL-21704 would require 18 feet of clearance to an adjacent riparian boundary for safe navigation. While it is not accepted that the open space necessary would be to the edge of a riparian boundary, Grieser's opinion that 18 feet of open space between the lateral and an adjacent obstruction appears reasonable.

162. As stated previously, it is the burden of the party moving for summary judgment to prove that there exist no genuine issue of material fact. With respect to issues surrounding safety and navigation as well as interference with public interests and private property rights, neither the Petitioners, nor the Applicant Respondents, has prevailed.